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IN THE

SUPREME COURT
of the United States

October Term, 1933

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

Petitioner and Appellee below

vs.

ULUETTA PRINSEN

Respondent and Appellant below

Brief of Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

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I.

OPINIONS OF THE COURT AND OF THE CIRCUIT COURT BELOW:

R. 67, 72 and reported in 65 Fed. (2d) 841.

II.

STATEMENT OF CASE

The respondent, Uluetta Prinsen, a resident of Salt Lake City and County, Utah, commenced this action in the Third Judicial District Court of Salt Lake County, State of Utah,

against the petitioner, The Travelers Protective Association of America, a corporation, organized under the laws of the State of Missouri, and duly authorized to do business as a foreign corporation in the State of Utah (R. 1), to recover $5,000.00 with interest, upon a certificate of membership issued under date of October 13, 1915, by petitioner corporation to James Prinsen, now deceased, and in which certificate of membership respondent, the widow of the said James Prinsen, was named as beneficiary. Thereafter, and upon proceedings duly and regularly had therefor the petitioner removed the case from the State Court to the District Court of the United States for the District of Utah (R. 5). Before the latter court a trial was had with a jury which resulted in a verdict being directed against the respondent and in favor of the petitioner (R. 13). From this verdict and the judgment entered thereon, an appeal was taken to the Circuit Court of the Tenth Circuit. That court, in its decision, reversed the lower court (R. 74).

Petitioner is a fraternal beneficial society, operated solely for the mutual benefit of its members and their beneficiaries and not for profit. It has a lodge system and a representative form of government and makes provision for the payment of the benefit claimed should the member, while in good standing and subject to the conditions, provisions and limitations of its constitution, amendments thereto and by-laws, through external, violent and accidental means receive bodily injuries which, within six months following the date of said accident, result in his death (R. 6).

It is alleged by respondent that James Prinsen, the assured and a member in good standing of petitioner corporation, came to his death on the 3rd day of February, 1931, by rea-

son of bodily injuries received that day through external, violent and accidental means at or near Cudahy Lane, Davis County, State of Utah, as a result of collision between a railroad train and an automobile in which the said James Prinsen was riding (R. 1-5).

On the part of petitioner it is alleged that the automobile in which the deceased was riding at the time of the accident was loaded with a large number of dynamite caps and that his death was caused by reason of the fact that he was "participating" in the moving or transportation of dynamite caps, contrary to the articles of incorporation, constitution and by-laws of petitioner corporation which provide that the petitioner corporation shall not be liable in case of injuries, fatal or otherwise, "when a member is participating * * * in the moving or transportation of gun-powder, dynamite or other explosive substance or substances" (R. 8-9).

Petitioner further alleges that the death of the said James Prinsen resulted from a voluntary or unnecessary exposure to danger or obvious risk of injury in violation of the provisions of the articles of incorporation, constitution and by-laws of petitioner corporation which provide there shall be no liability when the death of the member is "the result of voluntary or unnecessary exposure to danger or to obvious risk of injury." It is contended by petitioner that James Prinsen voluntarily and unnecessarily exposed himself to danger and to obvious risk of injury in riding upon the automobile truck loaded with dynamite caps as aforesaid, and in heedlessly, negligently, voluntarily and unnecessarily allowing the truck, loaded with dynamite caps, to be driven onto the railroad track in front of a train rapidly approaching thereon (R. 9).

By way of reply, respondent denies the affirmative allega-

tions of petitioner including those to the effect that the deceased was participating in the moving or transportation of an explosive substance at the time of the injury resulting in his death or that his death resulted therefrom, or that he voluntarily or unnecessarily exposed himself to danger or to obvious risk of injury. Respondent affirmatively alleges that at the time of the accident the deceased was riding upon the automobile as an invitee or guest and had no control in the operation or running thereof (R. 10-12).

Respondent further alleges, by way of reply, that the certificate of membership issued to the deceased was issued by petitioner with the full knowledge, understanding and agreement that deceased was employed as a powder salesman by the Western Powder Company, and engaged in the handling, purchase, sale and distribution of dynamite caps, gun-powder and dynamite.

Practically the entire case was submitted upon stipulations of fact by both parties which show, in the main, that at the time of the accident James Prinsen, the assured, was riding upon the automobile truck driven by a man by the name of Begaman, an employee of the Tintic Powder & Supply Company; that the dynamite caps on the truck had been delivered sometime prior to the accident to the Tintic Powder & Supply Company, through the medium of Begaman, by Mr. Prinsen, an employee of the Western Powder Company, who, after the delivery of the caps, chose to return to Salt Lake City on the truck as a guest or invitee of Begaman (R. 30-33). The record also shows that the application for membership stated that the applicant was engaged in the commission business, selling powder as a salesman (R. 28). Under the circumstances the trial court held, as a matter of law, that

James Prinsen was "participating" in the moving or transportation of an explosive substance, that his death resulted thereby and that, under the circumstances, he voluntarily and unnecessarily subjected himself to danger or to obvious risk or injury. The trial court holding, as a matter of law, that the conduct of the assured came within the excepted risks of the policy of insurance, directed a verdict in favor of petitioner (R. 12-13).

SUMMARY

It is submitted by the respondent herein that the following points will arise in a consideration of this case:

1. It being admitted that the assured met his death solely through external, violent and accidental means, the distinct burden was on the insurer to prove that death resulted from a cause excepted in the policy, and not only must the proof go to the extent that the death was caused by an excepted risk but it must be shown that the excepted act was the proximate cause of the death.

2. The deceased in this case was not participating in the moving or transportation of dynamite caps, within the meaning of the policy, but was a mere guest of the truck driver who was hauling such caps for his employer.

3. When two causes join in causing an injury, one of which is insured against, under an accident policy, the insured is covered by the policy, or at least it is a question for the jury to determine.

4. The assured's death was not the result of voluntary or unnecessary exposure to danger or to obvious risk of injury.

5. Inasmuch as the assured in his application for the policy gave his occupation as powder salesman for the West-

ern Powder Company, which company was engaged in the purchase, sale and distribution of dynamite caps, gun-powder, and dynamite, the company cannot now avail itself of risks which might be incident to the assured's occupation.

ARGUMENT

I.

THE ASSURED WAS NOT, AT THE TIME OF HIS DEATH, "PARTICIPATING" IN THE MOVING OR TRANSPORTATION OF THE DYNAMITE CAPS.

It was stipulated in this case, (R. 37), that the assured, James Prinsen, was not an employee of the purchaser of the dynamite caps nor of the owner of the dynamite caps at the time of the collision with the train resulting in his death. He was at the time of his death riding on a truck in which explosive substances were being moved and transported by others. Can it be said that, under these circumstances, Mr. Prinsen was "participating" in the moving or transportation of explosives?

Great reliance is had by the petitioner on the case of Head vs. New York Life Insurance Company, 43 Fed. (2d) 517, where the court held that one in an airplane is participating in aeronautics by riding therein for the purpose of obtaining information as to the formation of an accident insurance policy. It is readily seen that that case is distinguishable from the case at bar. Everyone who enters an airplane for the purpose of flying is participating in aeronautics, but if he entered an airplane that was under contract with the United States government to carry mail, he would not be participating, necessarily, in the carrying of the United States mail.

By a parity of reasoning, Prinsen, at the time he was killed, was unquestionably participating in riding on a truck or in "automobiling," but that was all. This distinction is rather clearly drawn in the case of Bew vs. Travelers' Insurance Company, 95 N. J. Law 533, 112 Atl. 859. In discussing this question, the court said at page 860:

> "If the question were respecting the scope of the provision that the policy did not apply to anyone 'participating in tobogganing,' would it be asserted that the occupants of the sled who had no part in the steering were not participating in tobogganing? If one *rides in the rear seat* of an automobile, is he not participating in automobiling? If one hires a motorboat and crew to take him for a ride on a river, would it be said that he was not participating in boating? It seems clear that he would be."

But, the mere fact that the driver of a truck, loaded with freight belonging to his employer, allows someone to ride with him, would not make the guest or occupant so riding a participant—have a share in—take part in—the transportation of freight with which the truck was loaded. Suppose, for instance, that Mr. Prinsen had delivered the dynamite caps to the railroad company for shipment to the purchaser at a distant point and then had boarded the next train of that company as a passenger, and suppose further that the company's agents had loaded the caps on the baggage or express car of that train with Mr. Prinsen's knowledge and then assume that Mr. Prinsen's train was derailed or met with some other accident and the caps exploded and Mr. Prinsen had been killed in that manner, could it be said that he was participating in the transportation of the caps so as to defeat the right of recovery on his accident insurance policy? He would

clearly be participating in train riding or railroading or something of that sort, but surely it cannot be seriously contended that he was participating in more than this, any more than he would be participating in any other of the manifold activities in which the railroad and train of cars were engaged, in the moving of that particular train. We believe that no valid distinction can be drawn between this sort of a case and the case at bar.

It has been held:

> "Where, upon completion of a flight in an airplane, the assured stepped onto a wing of the plane, and then, in bending over to avoid a drift wire, was struck by the propeller as he straightened up, although his death was a sequence of participation in an airplane flight, it was not 'in consequence of having participated in aeronautics,' within exemption provision of life and accident policy."
>
> Tierney vs. Occidental Life Insurance Company of California, 89 Cal. App. 779, 265 Pac. 400.

II.

ASSUMING THAT THE ASSURED, AT THE TIME OF HIS DEATH, WAS "PARTICIPATING" IN THE MOVING OF THE DYNAMITE CAPS, STILL IT IS INCUMBENT UPON THE PETITIONER HERE TO PROVE THAT SUCH PARTICIPATION WAS THE PROXIMATE CAUSE OF THE ASSURED'S DEATH, AND IT IS SUBMITTED THE COURT COULD NOT SAY, AS A MATTER OF LAW, THAT IT WAS SUCH A PROXIMATE CAUSE.

It is true that the by-laws of the defendant company

which govern the policy in question provide that the company shall not be liable "*when* a member is participating * * * in the moving or transportation of gunpowder, dynamite or other explosive substance or substances." (R. p. 26). It is also true that the trial court laid much emphasis on the word "when" as used in the foregoing provision of the by-laws and, in effect, held that the assured's alleged participation in the moving or transportation of explosive substances need have no causal connection with his death in order to defeat recovery on the policy. This position appears to us to be untenable.

The contract of insurance must be given a reasonable construction and one which comports with the intent of the parties. The obvious and, to our minds, the only reasonable intent of the parties in agreeing to except this particular risk from the operation of the policy was that the company did not intend to become liable for the death of a person who was killed by reason of an explosion occurring while he was moving explosives from place to place. If he were moving explosives and were accidentally killed from some other and absolutely unrelated cause, it would seem to be an abortion of justice to deny recovery by the beneficiary. Suppose, for instance, in the case at bar, that the dynamite caps had not exploded at all, even after the truck was hit by the train, and that Prinsen's death was admittedly caused by the impact of the collision alone. Apparently the trial court would have taken the view that he could not have recovered, and such a view, we believe, would have been error. Or, to go a step further, suppose that Prinsen had been accidentally struck by a bullet from a gun as he was riding on the truck and his death had resulted. Would it still be reasonable to say that he could not

recover even though the court determined, as a matter of law, that he was participating in the transportation of explosives within the meaning of the terms of his policy? We think not, and we submit that the trial court fell into grave error in not only holding that Prinsen was participating in the moving of explosives, but in deciding, further, that the defendant was not obliged to show any causal connection between his so doing and his death.

The law seems fairly well established that the insurer not only has the burden of proving that the assured was performing an act excepted from the operation of the policy at the time of his death, but of further proving that such act was the proximate cause of the death itself. Thus the general rule is stated in Cooley's Briefs on Insurance, 2nd Edition, Volume 6, page 5296, as follows:

> "To be available to relieve the insurer, the excepted risk must be the direct cause of the death or injury."

In the case of Matthes vs. Imperial Acc. Assn., 110 Iowa 222, 81 N. W. 484, the plaintiff's insurance policy excepted the company from liability if the disability was incurred "while violating the law." It will be noted that the word "while" was used in the policy which is synonymous with the word "when" as used in the policy in the case at bar. The accident for which the assured sought to recover happened on a Sunday while the plaintiff was attempting to get some pidgeons out of the cupola of his barn. The defendant contended that the plaintiff, in attempting to get the pidgeons, was violating the statute which prohibited labor on Sunday and that consequently he could not recover. The court ex-

pressed doubt that the plaintiff was violating the law, but went on to hold that in any event there was no causal connection between the alleged violation and the accident, stating:

> "We may further suggest on this question that the violation of law mentioned in the policy is evidently intended to comprehend acts that will avoid the risk if done at any time. They must be in the nature of contributing causes, and not mere conditions of the accident."

So, also, in the case of Jones vs. U. S. Mutual Accident Association, 92 Iowa 652, 61 N. W. 485, the court construed an accident policy which provided that the insurance should not "extend to or cover accidental injuries or death happening *while* the insured is under the influence of intoxicating drinks, or in consequence thereof; or *while* or in consequence of violating the law." Again, the court will see that the word "while" as well as the phrase "in consequence of" is used. The court said:

> "Defendant asked instructions, which were refused, to the effect that plaintiff could not recover because the evidence showed that Jones received the mortal wound—First, in violation of law, in being in a house of ill fame for an immoral purpose, and carrying concealed weapons; second, while fighting and quarreling; third, by voluntary exposure to unnecessary danger. It may be conceded that Jones visited the house of prostitution for an unlawful purpose; that he was carrying concealed weapons, in violation of law; but it does not appear that the injury he received was caused by any of these illegal acts. It is not enough to defeat liability to show that the assured violated the conditions of the policy in these respects, but it must also be shown that such violation had a causative connection with the injury. The shooting was not, in a legal sense, caused by or the result of

> the assured's visit to the bawdyhouse,—reprehensible as that act may have been,—nor of his carrying concealed weapons in violation of law. In other words, it does not appear that there was any such connection between the unlawful acts and the injury as would justify the contention that the former caused the latter. If the injury was caused or produced by something else than the assured's violation of the law, then the latter cannot be said to have such a legal relation to the former as to be a defense to the action upon the policy."

The case of Accident Insurance Company of North America vs. Bennett, 90 Tenn. 256, 16 S. W. 723, is also in point, one of the syllabi of that case reading as follows:

> "Under a policy stipulating that the insurance does not extend to injuries received while engaged in, or in consequence of, any unlawful act, the fact that the assured was killed while living in a state of fornication with his mistress does not prevent a recovery, where it does not appear that the infliction of injury is a natural and necessary consequence of the unlawful association, as its probable and to be anticipated result."

The court thereupon emphasized this theory at page 725 of its opinion as follows:

> "But again, passing this question, if it were true that such association *per se* was an unlawful act, it would not follow that plaintiff could not recover. In order to defeat a recovery because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the insured, and that death occurred during the time he was engaged in its commission. There must be some causative connection between the act which constituted a violation of the law and the death of the insured. Bloom vs. In-

> surance Co., 97 Ind. 478. Illustrating, it is aptly said in the same case: 'Suppose a man violates the law against profanity, and is shot while so doing, should that absolve the company from liability?' And see, to the same effect, Bradly vs. Insurance Co., 45 N. Y. 432; Cluff vs. Insurance Co., 13 Allen 308. Numerous illustrations of similar character might be presented in which the act, however unlawful, has no relation to the death as its cause or contributory element; but they need not be multiplied. There is no pretense that the death was caused directly by any such unlawful act of deceased, or resulted as a natural consequence thereof."

A somewhat similar situation arose in the case of Wilkinson vs. Travellers' Insurance Co. (Tex. Civ. App.) 72 S. W. 1016, one of the syllabi thereof reading as follows:

> "A stipulation in an accident policy, exempting the insurer from liability for injuries received by the insured while hunting, does not relieve the insurer from liability for injuries sustained by the insured while helping to bring in a log to make a fire while on a hunting expedition."

In the quite late case of Whyte vs. Union Mutual Casualty Company, 209 Iowa 917, 227 N. W. 518, the court reaffirmed this doctrine. It is stated in one of the syllabi:

> "Under accident insurance policy excepting loss resulting from any act of insured while engaged in or in consequence of any violation of law, beneficiary *held* not entitled to recover if violations of law were proximate cause of accident rather than sole cause."

An analogous situation arose in the case of Wright vs. Aetna Life Insurance Company, (C. C. A. 3rd), 10 Federal

(2nd) 281, where the court construed the words "while riding in" an automobile as used in an accident insurance policy to, in effect, mean *as a result* of riding in an automobile. The third syllabus reads as follows:

> "An additional policy, in form of automobile rider, covering injuries received "while riding in" automobile, *held* to cover accidents which might reasonably be expected to happen to one riding in a car, and to cover injury received when assured jumped or was thrown from car after driver lost control."

It would seem reasonably clear, both on principle and from an examination of the authorities, that the phrase "when participating" as used in the policy in the case at bar must be construed to mean *as a result of* participating. This is the only construction that preserves what must have been the intent of the contracting parties, and the only construction that is fair to the assured, and at the risk of reiteration, we again suggest that the court will construe such clauses favorably to the assured.

If we are correct in the foregoing premise, the only remaining question is whether the trial court could say, as a matter of law, that the explosion of the dynamite caps was a proximate cause of the assured's death, keeping in mind that the burden was on the defendant to prove this, and keeping further, in mind the rule that if reasonable men could draw different inferences in this respect from the facts as they appear in the record, it was the duty of the court to submit the question to the jury.

The facts are largely undisputed. Unquestionably a jury could reasonably find that a heavy train, moving in excess

of twenty-five miles an hour, (R. p. 37) and striking the truck in which the assured was riding, was sufficient of itself to *instantly* cause the assured's death. Indeed, there is no evidence whatsoever in the record that the death of the assured was caused or hastened by the explosion of the dynamite caps. Certainly, the impact of the collision was sufficient to cause death, and certainly, also, it was first in point of time. It would seem, therefore, that every presumption should favor the view that a cause, sufficient of itself to produce a result and occurring first in point of time, did, in fact, cause the result, especially when the burden was on the insurer to prove otherwise and which it failed to do. The very most that might be said for the insurer in this connection would be that the jury might reasonably find that the assured's death was contributed to or hastened by the explosion of the caps. Viewing the matter, therefore, in the light most favorable to the insurer, it would seem that the court should have submitted the question of causation to the jury.

We respectfully submit that this situation is similar to the case of Travellers' Insurance Company vs. Melick. (C. C. A. 8th) 65 Federal 178, heretofore decided. That case involved an action on an accident insurance policy wherein one of the excepted risks was "suicide," precisely as one of the excepted risks in the case at bar is "participating" in the transportation or moving of explosive substances. The assured suffered an accidental gun shot wound which produced an agonizing tetanus. After suffering the agonies of this disease, the assured was found dead in his bed with his throat cut and a scalpel in his right hand. There was evidence that the tetanus might have caused his death, and also that the scalpel wound was sufficient to have caused it.

On this state of the record, the insurance company moved for a directed verdict which the trial court refused to grant. The court submitted to the jury the question whether the tetanus or the throat wound in fact caused the assured's death.

The Circuit Court of Appeals, speaking through Judge Sanborn, affirmed a judgment for the assured, and held, distinctly, two things: first, that the excepted risk of the suicide had to be a proximate cause of the assured's death in order to defeat recovery on the policy; and secondly, that the court could not say, as a matter of law, that the assured's slashing his own throat in such a way as to cut his trachea and jugular veins was even a contributing cause to his death, but that the question was one for the jury. The case is, of course, much stronger against the insurer than the case at bar because there the assured was obviously alive at the instant he buried the scalpel in his throat, whereas, in this case, there is not a scintilla of proof that the assured was alive either at the instant of the explosion or at the moment the force of the explosion reached his body. So far as the record here is concerned, the explosion may not even have occurred at the moment of the impact, as it clearly appears (R. p. 41) that the engine pushed the truck some considerable number of feet down the track before coming to a stop. The explosion may not have occurred until some of the dynamite caps hit the ground, who knows? And Prinsen may have died several seconds prior to this. Even if the explosion occurred instantly upon impact, if the force of the impact itself was sufficient to cause Prinsen's almost instantaneous death, the explosion could not be considered even as a contributing cause thereto.

The entire opinion of the court in the Melick case, supra,

so ably written by Judge Sanborn, is decidedly pertinent to the issues involved in the case at bar. We have stated above what we believe to be a fair summary of the holding of the court, but to give more emphasis to our position we quote the following meagre portions of the opinion, to-wit:

> "The first question in this case is whether or not the court below should have instructed the jury to return a verdict in favor of the plaintiff in error. The Travelers' Insurance Company of Hartford, Conn., the plaintiff in error, insured, by its written policy, Dr. Leonard H. Robbins, a physician of Lincoln, Neb., for a term of one year, against death that should result from 'bodily injuries effected during the term of this insurance, through external, violent, and accidental means alone, * * * independently of all other causes.' The policy provided that:
>
> "'This insurance does not cover disappearances; nor suicide, sane or insane; * * * nor accident, nor death, * * * resulting wholly or partly from * * * disease or bodily infirmity, hernia, fits, vertigo, sleep-walking, * * * intentional injuries (inflicted by the insured or any other person).'"
>
> * * * * *
>
> "Under this state of the evidence, it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting, was the proximate cause of the death, was a question of law for the court.
>
> "In Railway Co. vs. Kellogg, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:
>
> "'The true rule is that what is the proximate cause of an injury is ordinarily a question for the

jury. It is not a question of science or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.'

"This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here, * * *.

"It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case,—whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured then it was in no sense a cause of it; and, however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death,—the shot wound, the cutting, or both? *Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it.* It is only when

all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury."

* * * * *

"It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural and probable consequences of the negligent act. In the case in hand the contract is to indemnify the insured against death that shall result within 90 days from accidental bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone."

The Circuit Court of Appeals, in the case of Mutual Life Ins. Company vs. Hatten, (C. C. A. 8th), 17 Federal (2d) 889, speaking through Judge Kenyon, and in citing the Melick case, supra, held under circumstances very much in point to the case at bar, that the question of causation should have been submitted to the jury. The court stating in part as follows:

"No one saw the accident. It will ever remain a mystery, and there must be more or less surmise as to how it happened. * * * The rule as to direction of verdicts is well established in the federal courts. Where the evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question is for the jury."

We submit, therefore, that even should this court deter-

mine that, as a matter of law, the assured, at the time of his death, was "participating" in the moving of explosive substances, that it should also conclude that the question of his "participation" as being the proximate cause of his death should have been submitted to the jury under proper instructions.

III.

THEN THE NEXT QUESTION IS WHAT WAS THE PROXIMATE CAUSE OF MR. PRINSEN'S DEATH IN THIS CASE?

This question has frequently been before the courts. In the case of Aetna Insurance Company vs. Boon, 95 U. S. 117, 24 L. Ed. 395, the question was given a full and thorough consideration. That was a case where a federal commander of the U. S. army burned certain property in Glasgow, Missouri, to prevent the use of the provisions therein contained by Confederate soldiers who were about to take the town. The policy was one covering fire insurance but containing an exemption as to loss resulting from invasion and insurrection of the place, and the court there held that the loss was within the exception; that the burning of the town by the military commander was a mere incident or remote cause, as distinguished from the proximate cause. In the course of the opinion, the court said:

> "The proximate cause is the efficient cause—the cause that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior controlling agency are not the proximate causes and the responsible ones though they may be nearer in time to the result."

95 U. S. 130, 24 L. Ed. 398.

In the course of the opinion, the court approved the following language from Brady vs. Insurance Company, 11 Mich. 425:

> "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed."
> 95 U. S. 131, 24 L. Ed. 399.

There are many other illustrations of the application of the rule under discussion cited in the opinion by the court in that case.

This court had the question before it in the Louisiana Insurance Company vs. Tweed, 7 Wal. 44, 19 L. Ed. 65, as to what was the proximate cause of the loss. The policy covered destruction by fire and a fire arose from an explosion. Explosions were within the exception of the policy and it was there held:

> "Where an explosion produced or set in operation the fire which burned the plaintiff's cotton, the fact that it was carried to the cotton by first burning another building will not so take the case out of the exception in the policy that the insurers will not be liable by means of an explosion nor can the accidental circumstance that the wind was blowing in the direction to favor the progress of the fire toward the warehouse be considered as a new cause."

See also, The G. R. Booth, 171 U. S. 450, 19 S. Ct. 9, 43 L. Ed. 234.

In reviewing the matter of proximate cause in an action

where it was sought to hold a railroad company for the destruction of goods where a baggage car was burned up, after it had been blown over, the Supreme Court of Colorado made these observations:

> "In Insurance Company vs. Tweed, 7 Wall. 52, the late lamented Mr. Justice Miller said: 'We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.' In Howard Fire Insurance Co. vs. Norwich & N. Y. Transp. Co., 12 Wall. 199, in delivering the opinion of the court, Mr. Justice Strong said: 'And certainly, that cause which set the other in motion, and gave to it its efficiency to do harm at the time of the disaster, must rank as predominant.' In Railroad Co. vs. Kellogg, 94 U. S. 475, it is said: 'The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' In Insurance Company vs. Boon, 95 U. S. 130, it is said: 'The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster.' "
>
> Blythe vs. Denver & R. G. Ry. Co., 15 Colo. 333, 25 Pac. 702, 22 A. S. R. 403, 11 L. R. A. 618.

In that case it was held that a wind storm blew the baggage

car over, up-setting a kerosene stove, consuming the car by fire, was traceable to an act of God, i. e., the wind storm, and the carrier therefore was not liable.

It is generally held that the destruction of a building by an explosion, caused by a fire, is a loss by fire within the meaning of a provision in the policy of insurance providing that the company shall not be liable for any loss or damage caused by explosion of any kind, unless fire insues and then for the loss by fire only.

Washburn vs. Farmers' Insurance Co., 2 Fed. 304.

See also,

Washburn vs. The Miami Valley Insurance Company, 2 Fed. 633.

See also, other cases dealing with proximate cause:

Phoenix Insurance Co. vs. Charleston Bridge company, 65 Fed. (C.C.A. 4th) 628;

Park Saddle Horse Company vs. Royal Indemnity Co., 81 Mont. 99, 261 Pac. 880;

Wright vs. Aetna Life Insurance Company, 17 Fed. (2d) 596.

A provision in a policy reading:

"Upon the 21 steam boilers and 34 filters, tanks, converters, etc., on the premises occupied by the assured as Sugar Refinery, situate in the City of Chicago, State of Illinois, and upon the steam pipes, the 9 engines, the shafting, belting, hangers, pulleys and the two elevators connected therewith and operated thereby, against explosion and accident, and against loss or damage resulting therefrom, to the property,

real and personal, of the assured and to all property of other persons for which the assured may be liable."

But containing this exception:

"And no claim shall be made under this policy for any explosion or loss caused by the burning of the building or steamer containing the boiler or boilers, engines, elevators, or machinery, or for any loss or damage by fire resulting from any cause whatever."

The second syllabus of this case is as follows:

"A small fire broke out in the insured building, and continued for three days, though apparently extinguished each day. On the third day efforts to put out the fire resulted in bringing it in contact with a cloud of starch dust, which ignited and exploded, demolishing the building, which then burned up. Held that the insurance company was not liable, since the explosion was merely an incident of the fire."

American Steam Boiler Ins. Co. vs. Chicago Sugar Refining Co., 57 Fed. 294.

In a case where the plaintiff owned a three-story building, 39 feet high and was insured against loss and damages by fire. Fire consumed the anterior of an adjacent five-story brick building, leaving an unsupported brick wall standing 69 feet high and 175 feet long. Several days thereafter, a strong wind arose, during which time the wall fell upon the plaintiff's building causing the damages sought to be recovered for. It was held that the proximate cause in this case was damages by fire.

Russell vs. German Fire Insurance Company, 100 Minn. 528, 111 N. W. 400;

10 L. R. A. N. S. 326.

In the course of the opinion the court said:

> "This brings us to the main question in the case: What was the proximate cause of the damage? * * * Whatever may have been the original meaning of the maxim, CAUSA PROXIMA ET NON REMOTA SPECTATUR, it has been clearly settled by a long line of decisions that what is meant by proximate cause is not that which is last in time or place, not merely that which was in activity at the consummation of the injury, but that which is the procuring, efficient, and predominant cause. Thus, in our own state, in Ransier vs. Minneapolis & St. L. R. Co., 32 Minn. 331, 20 N. W. 332, in applying the maxim, it was held that in a negligence case the wrongdoer was responsible for all the injuries which resulted as the natural consequence of his misconduct,—such consequences as might have been reasonably anticipated as likely to occur; and that, whether an injury in a particular case was the natural, proximate result of the wrong complained of is ordinarily a question of fact for the determination of the jury. In Christianson vs. Chicago, St. P. M. & O. R. Co., 67 Minn. 94, 69 N. W. 640, it was said: 'Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate.' Again in Strobeck vs. Bren, 93 Minn. 428, 101 N. W. 795, the following definition of proximate cause was adopted: 'The proximate cause of an injury, within the meaning of the law of negligence, is such cause as operates to produce particular consequences without the intervention of any independent or unforeseen cause or event, without which the injury could not have occurred,—such consequences as might reasonably have been anticipated as likely to occur from the alleged negligent act.' Proximate cause has also been defined as being that from which the effect might reasonably be expected to follow, without the concurrence of any unfore-

seen circumstances. The rule is stated in Marble vs. Worcester, 4 Gray 412: "Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of, the first, shall be found to intervene between it and the result.' In Brady vs. North Western Ins. Co., 11 Mich. 425, the rule is discussed as follows: 'Much is said by judges of the proximate and remote cause of the loss; and the distinction was very elaborately discussed by counsel in the present case. But, after careful consideration, I must confess that, to my mind, the word 'proximate' is unfortunately used, and serves often to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed.' In speaking of the rule as applied to insurance cases, it is said (Vol. 3, Sec. 2832, Joyce on Insurance): 'It may be generally stated that the loss in insurance cases must be proximately caused by a peril insured against, and that the contract does not contemplate an indemnity to the assured where the peril is the remote cause of loss.' In discussing the liability to misapply the maxim, Mr. Phillips, (Phillips, Ins. Sec. 1132) observes: 'In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster.' Again: 'In every insurance, the risk on each peril is liable to be affected by every other peril; and the party, whether insurer or assured, at whose risk a peril is, must bear the loss by such peril, though it may have been indirectly and incidentally enhanced by another, for which he is not answerable, where there is no express or implied stipulation, obligation, or condition against the subject being exposed to such other peril; but, where the loss is by a risk to which the subject is exposed in violation of the express or implied stipulations of the

parties, the underwriter is not liable for it.' Sec. 1134.

"In this connection, it should be noted that it is not necessary, under policies of this character, that the damage should be occasioned by direct contact with the fire. To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. Ermentrout vs. Girard F. & M. Ins. Co., 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 481, 65 N. W. 635, where it was held that the fall of the insured building was within the policy, although no part of it ignited or was consumed by fire. See also New York & B. Despatch Exp. Co. vs. Traders' & M. Ins. Co., 132 Mass. 377, 42 Am. Rep. 440.

"A few leading cases will be sufficient to illustrate the maxim. In Lynn Gas & Electric Co. vs. Meriden F. Ins. Co., 158 Mass. 570, 20 L. R. A. 297, 35 Am. St. Rep. 540, 33 N. E. 690, a building and machinery used for generating electricity for electric lighting were insured against loss or damage by fire. A fire occurred which caused a 'short circuit' of the electric current, resulting in damage to certain machinery in the building not reached by the fire. It was held that the injury to the machinery caused in this way was a 'loss or damage by fire,' within the meaning of the policy. The court said: 'They must be presumed to have contemplated such effects as fire might naturally produce in connection with the machinery used in generating and transmitting strong currents of electricity.' Our attention has been called to a case from the civil court of Manchester, England (Gaskarth vs. Law Union F. Ins. Co., 6 Ins. L. J. 159), where it was held that the insurance company was liable for damages caused by the falling of the wall during a violent gale some time after the fire; but the facts are not fully stated and the principles are not discussed."

After distinguishing from other decisions, the court further observed:

"More nearly in point are the following: in Aetna F. Insurance Co. vs. Boon, 95 U. S. 130, 24 L. Ed. 398, the policy of insurance was upon certain goods then in storage in the city of Glasgow, Missouri, and contained the following stipulation: 'Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.' October 15, 1864, an armed force of rebels, under military organization, surrounded and attacked the city. The Union forces defended, and battle continued for many hours, and, when it became apparent to the Union commander that the city could not be successfully defended, in order to prevent the military stores from falling into the hands of the enemy, he set fire to the city hall, which was consumed with its contents. The fire spread to the building next adjoining, and from that, through two other buildings, to the store containing the insured goods, which were destroyed. The court held that the fire which destroyed the goods was within the exception of the policy, and that there was no liability; that the attack of the enemy was the proximate cause of the loss; that the fire which caused the destruction of plaintiff's property happened or took place not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful; that the attack, as a cause, never ceased to operate until the loss was complete, and it was the causa causans which set in operation every agency that contributed to the destruction. The inquiry must always be whether there was any intermediate cause disconnected with the primary fault, and self-supporting, which produced the injury. The burning of the city hall and the spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town. A case almost directly in point is that of Johnston vs. West of Scotland

Ins. Co., 7 Shaw & D. 52, where a house covered by a policy of insurance from damage by fire had been injured by the falling of a gable of another house in consequence of fire in that house, and it was held that the company was liable, although the house insured had not been on fire, and the gable of the other house had stood two days after the fire was extinguished, and fell in the course of taking the house down. Howard F. Ins. Co. vs. Norwich & N. Y. Transp. Co., 12 Wall. 194, 20 L. Ed. 378, and New York & B. Despatch Exp. Co. vs. Traders' & M. Ins. Co., supra, illustrate the rule applicable where an efficient cause nearest the loss is expressly insured against. In such cases the insurer is not to be relieved from responsibility by showing that the property was brought within that peril by a cause not mentioned in the contract.

"Applying these principles, it is evident that the contract must be considered from the standpoint of the parties at the time of its execution, in the light of the surrounding circumstances. The risk as defined by the policy covered whatever causes produced the result. The inquiry resolves itself to determining whether or not the wind was an incident in the chain of events or the primary cause."

For another case where the wall of a burned building fell and recovery was allowed, see:

Western Assurance Co. vs. Hann, 29 Ala. 376, 78 So. 232.

Adverting for a moment to the facts here and application of the legal principles stated in the foregoing portion of this brief, we direct the court's attention to the fact that under these, no doubt, sound rules of law, the proximate cause of Mr. Prinsen's death was the collision between the truck and

the train and not the transportation of the dynamite caps at all. If the train had not collided with the truck, from what it appears here, the occupants of that truck could have continued to this good day on their journey, hauling the dynamite caps therein.

We do not concede that Mr. Prinsen's death resulted from the explosion of the dynamite caps, but for the sake of argument, if it be conceded that the train collided with the truck, caused the explosion, and the explosion produced the death of Mr. Prinsen, then it is respectfully submitted that the collision between the train and the truck was the proximate cause—was the cause that set in movement the force that exploded the caps that ultimately extinguished the life of Mr. Prinsen. The case is analogous to the one here cited where fire burns a building and leaves a wall standing and the wall falls on another building and where it was held that the loss thus occasioned was within the terms of a fire insurance policy and the proximate cause was the fire, the fire setting in movement the force that destroyed the building; analogous also to the case where an explosion causes a fire and the fire destroys the building is held to be without the terms of a policy of insurance against fire; analogous also to the case where rebel forces were about to invade Glasgow, Missouri, and the federal commander burns up the supplies and the fire spreads, the proximate cause is the invasion. So, here the proximate cause was not the transportation of dynamite caps which was a mere incident—a remote cause at most. Suppose the collision had occurred as it did, killed Mr. Prinsen, and the dynamite caps had not exploded. Would the petitioner here maintain that it was not liable on the policy involved in this

action. The mere fact that the explosion occurred as an incident of the collision cannot change the situation.

In concluding this branch of the case, we submit that the Circuit Court of Appeals was correct in reversing the lower court and holding that the lower court was in error in directing a verdict in favor of the petitioner here, the defendant below, and that under this record, clearly the question was for the jury to pass upon as different inferences could be drawn from the stipulated facts. We contend, however, that under the rules of law as well recognized and controlling and governing insurance cases, that the lower court ought to have directed a verdict in favor of this respondent, the plaintiff below.

IV.

WHERE TWO CAUSES JOIN IN CAUSING AN INJURY, ONE OF WHICH IS INSURED AGAINST UNDER AN ACCIDENT POLICY AND THE OTHER NOT, THE ASSURED IS COVERED BY THE POLICY.

It appeared in a case that the assured in the daytime and immediately before receiving physical injuries which caused his death, was operating a motorcycle at a speed of twenty-five miles per hour in an easterly direction along a street, which street crossed over an electric railroad. There were cross-arm warnings at the crossing. In approaching the crossing, however, the view to the north was obstructed to a point about thirty feet east of the tracks. The motorcycle was about that distance from the track when the train from the north reached and was moving across the intersection. The motorcycle collided with the side of the cars of the train, causing the injuries from which the assured died.

The clause of the policy under which the plaintiff sought to recover insured against death or disability sustained by the insured "by being struck or knocked down or run over while in or on a public highway by * * * any vehicle * * * propelled by * * * electricity (excluding injuries sustained while on a railroad right of way in violation of statute or any regulation of the railroad company." The plaintiff had judgment below. The court in disposing of the question arising under this brief statement of facts, observed in the course of the opinion:

> "According to the stipulation, the impact was sufficient to break through one of the doors which opened in the side of the car. From this it is contended that the assured was not struck by the car, but that his injuries were wholly due to the velocity of the motorcycle when the collision occurred.
>
> "It has been held that, when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy. (Continental Life Ins. Co. vs. Wilson, 36 Ga. App. 540, 137 S. E. 403; Wright vs. Aetna, etc., Ins. Co., (C.C.A.), 10 Fed. 281, 46 A. L. R. 225); and while from the nature of the accident and other circumstances shown different conclusions might be drawn, the inference which appears to have been drawn by the trial court that the insured was struck by the car is not unreasonable, and is supported by the evidence."
>
> Zimmerman vs. Continental Life Ins. Co., 99 Cal. App. 723, 279 Pac. 464.

Again, it has been held where more than one cause contributed to an injury, or if there is doubt, or facts are such that equally prudent persons might draw different conclusions as to which of the contributing causes is the efficient,

dominent, proximate cause, it is a question for the jury in an action on an accident policy.

Chicago & Eastern Illinois Ry. Co. vs. Whipking, (Ind. App.), 170 N. E. 548.

V.

THE ASSURED'S DEATH WAS NOT THE RESULT OF VOLUNTARY OR UNNECESSARY EXPOSURE TO DANGER OR TO OBVIOUS RISK OF INJURY.

In dealing with this matter, it is well to remember that the burden was on the insurer to prove that the insured voluntarily or unnecessarily exposed himself to danger or obvious risk of injury and that this was a cause of his death. In endeavoring to sustain this burden, the only thing which the insurer proved, or in the nature of things could prove, was that the insured was riding in the truck when the driver drove it in front of the approaching train. There is not the slightest evidence that the insured knew that they were approaching a railroad crossing or that he saw the train at all. The only evidence on the matter at all is the testimony of the fireman (R. p. 40) that he "saw two men in the truck, sitting in the covered cab side by side, and he further saw that the truck was loaded with boxes." On this state of the record, and with the burden of proof on the insurer, it is difficult for us to understand how the court could say, as a matter of law, the assured was voluntarily and unnecessarily exposing himself to danger or obvious risk of injury, and that this was a cause of his death.

Counsel for petitioner, in the argument on the motion for a directed verdict, relied almost entirely on two cases in sup-

port of this ground of their motion; that of The Baltimore & Ohio Railroad Company vs. Goodman, 275 U. S. 66, 45 Sup. Ct. Rep. 24; 72 Law Ed. 167, and that of Parramore vs. Denver & R. G. W. R. Co., (C. C. A. 8th), 5 Federal (2d) 912. With these cases, of course, the court is familiar. In the Goodman case, Mr. Justice Holmes appears to hold that where the driver of a truck or automobile goes upon a railroad crossing, he is, as a matter of law, guilty of negligence unless he stops, looks and listens. Under the peculiar facts of the Parramore case, the Circuit Court of Appeals has held that an invitee or guest riding in a truck or automobile is also under a high duty of care to protect himself if the operator drives the vehicle on a railroad track. Thus the petitioner's counsel argue that in view of these two cases, Prinsen was, as a matter of law, guilty of contributory negligence at the time of his death.

Now, although we concede the force of the Goodman and Parramore cases, we suggest that the doctrine therein announced border on the extreme and should not be further extended. Even granting, for the purpose of argument, that Prinsen's conduct as a matter of law amounted to negligence, we earnestly submit that negligence is wholly different from a "voluntary or unnecessary exposure to danger or to obvious risk of injury" and has been constantly so held by practically all of the authorities. If the insurer wished to avoid its liability in cases when the assured's *negligence* brought about his own death, it should have said so in the policy which it issued. This it did not do. It avoided the use of the word *negligence* entirely and used the rather complicated and ambiguous phrase heretofore referred to. Having deliberately chosen to use that phrase, it will be strictly construed against

the insurer and for this reason, the authorities universally hold that the phrase does not include negligence, and furthermore that it is nearly always a question for the jury whether the assured, in cases like the one before us, brought about his own death as a result of "voluntary or unnecessary exposure to danger or to obvious risk of injury."

The first case to which we wish to direct the court's attention is that of Travellers' Insurance Company of Hartford vs. Randolph, (C. C. A. 6th), 78 Federal 754. The court had for consideration an accident insurance policy which avoided the company's liability where the insured's death was caused by "voluntary exposure to unnecessary danger." The assured, just prior to his death, was standing upon the steps of the platform of a railroad car with his hands in his pockets while the train was running at a speed of about twenty-five miles an hour. He either fell or jumped off and was killed. The defendant insurer requested from the trial court a peremptory instruction that the assured's conduct amounted to "voluntary exposure to unnecessary danger." The question was left to the jury which returned a verdict in favor of the plaintiff. The judgment entered upon this verdict was affirmed by the Circuit Court of Appeals of the Sixth Circuit in a brilliant opinion written by Mr. Justice Harlan.

The insurer in the Randolph case depended very largely on a line of cases which held that a person standing on the steps of the platform of a moving train under circumstances similar to those which the plaintiff found himself was, as a matter of law, guilty of negligence and from this principle sought to argue that such a person was therefore, as a matter of law, guilty of "voluntary exposure to unnecessary dan-

ger." This situation is precisely parallel to the one we find in the case at bar, where the insurer relies on the doctrine of the Parramore case which, of course, has only to do with negligence. The Circuit Court of Appeals, however, disposed of this question by laying down the broad principle that cases having to do only with negligence have no weight in determining the meaning of the phrase "'voluntary exposure to unnecessary danger,'" as used in a *contract* of insurance. Elaborating upon this principle, the court, on pages 766-767 of its opinion, said:

> "Our attention has been called to numerous adjudged cases in which the court has instructed the jury, as matter of law, that certain acts upon the part of a passenger on a railroad car constituted such contributory negligence as precluded a right of recovery against the railroad company. The principles announced in those cases are not, in our opinion, applicable to a *contract* of life insurance that does not in terms exempt the insurer from liability where the death of the insured is caused by his negligence or want of due care. If an accident insurance company wishes to make it a condition of its liability that the assured shall not be guilty of negligence contributing to his injury or death, it should take care that the contract with the assured expressly so provides. The contract in suit covers the injury or death of the assured from all external, violent, and accidental means, except in the cases specifically declared in the contract not to be covered by its provisions. Bodily injury or death resulting from the carelessness of the assured is not excepted from the contract."

In dealing with the phrase "voluntary exposure to unnecessary danger," Mr. Justice Harlan in the Randolph case had to say:

> "The words 'voluntary exposure to unnecessary

danger,' literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is therefore the interpretation which the court should adopt. One of the accepted meanings of the word 'voluntary' is 'done by design or intention; purposed; intended.' Webst. Dict."

* * * * *

"Looking at the whole contract, the words 'voluntary exposure to unnecessary danger' are to be held as importing an exposure by the assured to unnecessary danger, with the intention or design at the time to risk the consequences of such exposure."

And in holding that the question was one for the jury the court said:

"Whether, in the present case, the exposure was unnecessary, and whether the assured was aware of and appreciated the danger, and intentionally or purposely risked it, were questions of fact that were properly left for the determination of the jury under appropriate instructions by the court as to the law of the case. In making such determination, the jury were entitled to look at all the evidence, and, as a recognition of the danger and the intention of the assured to take the risk attending the situation may not unreasonably have been inferred from the circumstances and from his acts, the jury were entitled to

> infer a voluntary exposure to unnecessary danger from any facts showing that he could not have failed to recognize the existence of the danger, and must have purposely or intentionally risked it."

The definition of the phrase "voluntary exposure to unnecessary danger," as given by the Circuit Court of Appeals in the Randolph case, is reasonable, fair and logical and, we believe, is supported by the great weight of authority including the following: Ashenfelter vs. Employers Liability Assurance Corp., (C. C. A. 9th) 87 Fed. 682; Thomas vs. Mason's Fraternal Accident Assoc., 71 N. Y. S. 692; Whalen vs. Peerless Casualty Co., 75 N. H. 297, 73 Atl. 642; National Life Ins. Co. vs. Logan, 166 Ala. 174, 52 S. 45; Empire Mutual Life Ins. Co. vs. Allen, 141 Ga. 413, 81 S. E. 120.

The foregoing reasoning and holding appears to us to be eminently sound and we believe there is no divergence from it in any of the authorities. If this is so, both the Goodman and the Parramore case are effectively eliminated from this discussion.

It may be objected that the phraseology of the excepted risk in the Randolph case is slightly different from the phraseology of the excepted risk in the case at bar. We think, however, that they mean substantially the same thing, as a companion case to the Randolph case indicates, namely: Fidelity & Casualty Company vs. Randolph, (C. C. A. 6th), 78 Federal 924. The latter case was decided on the same day and by the same court as the former and in the opinion also written by Mr. Justice Harlan, the court said:

> "The words, 'voluntary and unnecessary exposure to danger,' in the contracts with the Standard Life

> & Accident Insurance Company and the Preferred Accident Insurance Company, and the words, 'voluntary exposure to avoidable danger,' in the contract with the Union Casualty & Surety Company, mean the same as the words, 'voluntary exposure to unnecessary danger,' in the contracts with the Travelers' Insurance Company and Fidelity & Casualty Company."

It will be noted that the first phrase used in the opinion, to-wit: "voluntary and unnecessary exposure to danger" is precisely the same as the phrase used in the policy in the case at bar, except for the word "and." The case of Travelers' Protective Association vs. Jones, 75 Ind. App. 29, 127 N. E. 783, to which we will later advert, conclusively shows the word "or," as contained in the policy in the case at bar, is to be construed as the word "and."

It will be noted in the Randolph case that those cases having to do with negligence are not controlling under circumstances calling for the construction of a *contract* of life insurance when construing the phrase "voluntary exposure to unnecessary danger" or a similar exception. It will further be noted that giving the phrase a literal interpretation it would still exempt an exposure by the assured "enforced by the superior will of others." Certainly reasonable minds can differ on the question as to whether or not Prinsen was subjected, under even a literal interpretation of the policy, to obvious risk of injury or to a voluntary exposure to danger, by reason of the superior will of Begaman, the driver of the truck. Just what Prinsen did or what he could have done to prevent Begaman from driving the truck upon the railroad track is unknown. Under the circumstances all presumptions are in Prinsen's favor to the effect that he did everything humanly

possible to be done to prevent the truck being driven upon the railroad track. There is enough uncertainty and there is enough doubt under the circumstances to compel the trial court to submit the cause to a jury for its determination of the fact. This we believe is the holding of the Washington court in the case of Gaches vs. Daw. 168, Wash. 162, 10 Pac. (2d), 1111, where the court stated:

> "This court has never been overnice about scrutinizing the action of one who has been placed in peril by the negligence or wrongful act of another, and it has been uniformly held that, if the minds of reasonable persons may differ as to whether the act was that of an ordinarily prudent person, the question was one for the jury."

Furthermore, the court, in the Randolph case, states that "the better reason is with the cases holding that the words 'voluntary exposure to unnecessary danger' in accident policies such as the one here in suit import a consciousness of the danger and an intention to risk the consequences of exposing ones self to it." On this phase of the case the burden was upon the insurer and not only is the record entirely silent with reference to any "consciousness of danger" on the part of Prinsen and an "intention" on his part to risk the consequences of the danger, but every presumption is in his favor to the effect that he did not realize the danger or that being conscious of it did everything possible to avoid it.

Another case which we believe to be eminently worth while in connection with this discussion because it is so closely in point is that of Travelers' Association vs. Jones, supra. The important factor in the value of that case is that it involved an action against the appellee in the case at bar and

because it was an action on a policy similar to the one herein involved. The policy contained the same phrase that we are now discussing namely: "voluntary or unnecessary exposure to danger or to obvious risk of injury." In that case the assured walked on a railroad track and was killed by a train. The court construed the phrase now under discussion and held that it was properly a question for the jury whether, under all the circumstances, the assured's death resulted from "voluntary or unnecessary exposure to danger or to obvious risk of injury."

There are many other authoritative and well-considered cases which squarely hold that going upon or crossing a railroad track, though done carelessly and without possible attention to the possibility of approaching trains, is not, as a matter of law, a "voluntary exposure" to unnecessary danger or to "obvious risk" of injury. Some of these are: Keen vs. New England Mutual Accident Assn., 161 Mass. 149, 36 N. E. 891; Badenfeld vs. Mass. Mutual Accident Assn., 154 Mass. 77, 27 N. E. 769; Walter vs. Peoples, Health & Accident Ins. Co., 173 Mich. 581, 139 N. W. 865; Duncan vs. Preferred Mutual Accident Assn., 13 N. Y. S. 620, Aff. 29 N. E. 1029; Meadows vs. Pacific Mutual Life Ins. Co., 129 Mo. 76, 31 S. W. 578; Lehman vs. Great Eastern Casualty & Indemnity Co., 158 N. Y. 689, 53 N. E. 1127.

The proposition stated by both the Randolph and Melick cases, to the effect, that negligence of the assured is not available to the insured as a defense unless the policy expressly excepts from the risk accidents due to the assured's negligence, was re-affirmed by the Fourth Circuit Court of Appeals in the case of Zurich General Accident & Liability Ins. Co. vs.

Flickinger, (C. C. A. 4th), 33 Fed. (2d) 853, in an opinion written by Judge Parker and in which the court stated:

> "Defendant also takes the position that it was negligence on the part of insured to drink what he knew was 'bootleg' whiskey; and that, this being true, his death was due to negligence and not to accidental means. But it is well settled that it is no defense to an action on an accident policy that the negligence of the insured caused or contributed to the injury, unless the policy expressly excepts from the risk accidents due to insured's negligence, which is not the case here. 1 C. J. 487, and cases cited, particularly Travelers' Ins. Co. vs. Randolph, (C. C. A. 6th), 78 Fed. 754, 762, and Travelers' Ins. Co. vs. Melick, (C. C. A. 8th), 65 Fed. 178, 27 L. R. A. 629."

It will thus be seen from the principles elaborated upon in all of the foregoing cases that in order for the death of the assured to come within the excepted risk, the assured must be conscious of and contemplate the danger and deliberately expose himself to it. It is not enough that the assured is careless or that he does things which an ordinarily prudent man would not have done under like circumstances. Otherwise, very few accident policies would be of any value at all.

A large proportion of the persons injured or killed are in accidents, and to some extent at least, through their own fault. It is these very inadvertences and mistakes that they desire to protect themselves against when they pay the premiums on their policies. The insurer on the other hand does not wish them to intentionally injure or kill themselves. We believe, however, that there is not the slightest evidence adduced by the insurer in this case tending to show that Prinsen was conscious of the danger which ultimately overtook

him, or that being conscious of it, he deliberately and premeditatedly exposed himself to it. Even if there was some evidence to this effect, it would still be a question of fact for the jury to determine under all of the circumstances.

The record is utterly barren of any proof that Prinsen knew that the truck was approaching a railroad track or if he did, that a train was approaching. He may not have been looking at all. Of course, if he was not looking, it might be negligence under the Parramore case, but it would hardly fulfill the requirement of "consciousness" of the danger which is the prime element of a voluntary exposure to it as stated in the Randolph case and other similar cases. Moreover, so far as this record is concerned, even if Prinsen did see the approaching train and did realize his danger, there is not the slightest evidence that he did not pursue an affirmative course of action in order to obviate it. He may have told the driver to stop; he may have thought from something the driver said or did that he was going to stop; he may have thought, and reasonably so, that he would not have time to jump; he may have been unable to jump. With the burden on the insurer to affirmatively negative all of these things, and more, it is difficult to see how the trial court could hold, as a matter of law, that Prinsen consciously and deliberately exposed himself to danger and obvious risk of injury. Even in the Parramore case, where only the question of negligence was before the court, one of the vital facts was that the plaintiff did and said nothing, and this fact was affirmatively proven, the language of the court on this point being as follows:

> "Mr. Thomas, who was in the automobile with him, testified that he did not see Mr. Parramore do anything. Mr. Reynolds, who sat by his side on the

> front seat said Mr. Parramore did not say a word or try to get out of the car before the engine struck it."

We emphasize, again, that even assuming Prinsen was conscious of his danger, there is nothing to show that he did not try to avoid it. We are strongly inclined to the view that with the burden of proof on the insurer as it was, the court could well have held that the insurer had introduced no substantial evidence proving or tending to prove that Prinsen had consciously and wilfully exposed himself to danger and obvious risk of injury, and yet the only thing we asked was that the matter should have been submitted to the jury. It is a startling doctrine, under the circumstances, with Prinsen paying his premiums on this accident policy for over sixteen years, that his beneficiary is precluded from having a jury pass upon the question of whether his death, admittedly accidental, was caused by his conscious and voluntary exposure to danger in a collision where there were no witnesses as to what Prinsen did or did not do immediately preceding his death.

It is submitted, therefore, that the trial court fell into error in not submitting this question to the jury.

IV.

INASMUCH AS THE ASSURED, IN HIS APPLICATION FOR THE POLICY, GAVE HIS OCCUPATION AS POWDER SALESMAN FOR THE WESTERN POWDER COMPANY, WHICH COMPANY WAS ENGAGED IN THE PURCHASE, SALE AND DISTRIBUTION OF DYNAMITE CAPS, GUN-POWDER AND DYNAMITE, AND WHICH WAS KNOWN TO THE INSURANCE COMPANY, THE COMPANY CAN NOT NOW AVAIL ITSELF OF RISKS WHICH MIGHT BE INCIDENT TO THE ASSURED'S OCCUPATION.

Even if the court should conclude that the assured was "participating" in the moving or transportation of explosives at the time of his death and should further conclude that as a matter of law the concussion of the explosion was a proximate cause of his death, or even if the court determines that his death was the result of voluntary or unnecessary exposure to danger and obvious risk of injury, we nevertheless maintain that the insurer in this case cannot avail itself of these defenses, for the reason that it knew at the time it issued Prinsen his policy, and thereafter, that he was engaged in a business which had to do with the handling of explosives. The fact probably is that the character of his occupation was one of the reasons why Prinsen applied for, and for so many years paid premiums on, an accident insurance policy. In his written application to the company he gave his occupation as a salesman of powder (R. p. 27) and attached to this application a letter on the business stationery of the Western Powder Company, (R. p. 29) his employer. At that time, and before issuing its policy, the insurer had definite knowledge that

Prinsen's occupation was connected with explosives of all sorts. They were put fairly on notice that he would be in the vicinity of explosives, and, in all likelihood, at some time or another, ride on or perhaps drive conveyances on which explosives were moved and transported. Yet despite this, the insurer agreed to indemnify the assured's wife against his death by violent, external and accidental means, and yet it buried away in the print of its policy the provision that its liability would not extend to death caused by his "participating" in the moving or transportation of explosives. We believe that under these circumstances, the insurer cannot avail itself of this clause nor can it avail itself of the clause referring to voluntary or unnecessary exposure to danger insofar as such exposure has to do with the handling of explosives or riding on a truck loaded with them. Whether the principle for which we contend here be called estoppel or waiver does not concern us. The result only is of importance. It would seem, therefore, that if the insured was killed as a result of performing his duties as an employee of the Western Powder Company, the excepted risk above referred to would not be available to the insurer as a defense.

In Cooley's Briefs on Insurance, 2nd Ed., Vol. 6, page 5295, the general rule in this connection is laid down as follows:

> "The exception of certain risks is, however, not available to the insurer if the act done or risk incurred is within the scope of or incident to the occupation of insured, so as to be fairly regarded as one of the risks assumed as a risk of the occupation."

The following cases seem to support the foregoing principle:

In the case of Standard Life & Acc. Co. vs. Schmaltz, 66 Ark. 588, 53 S. W. 49, it was stated:

> "One of the duties of Schmaltz was to remove cylinder heads, when it was necessary to be done for the purpose of repairing engines, in the course of his employment. The dangers and probabilities of accidents happening while in the discharge of that duty, doubtless, entered largely into the consideration and contemplation of the parties when the contract of insurance was made. * * * Having obtained this knowledge or notice, and entered into this agreement, the appellant, undoubtedly, became bound by the delivery of the policy to insure Schmaltz, to the extent of $2,000, against all injuries which were coused solely by external, violent, and accidental means, while he was doing lifting or making exertions which pertained to his occupation and employment. Having paid for this protection he was entitled to its benefit."

In the case of Richards vs. Travelers' Insurance Co., 18 S. D. 287, 100 N. W. 428, the court said:

> "Upon the theory that a person insured as 'a cattle dealer or broker visiting yards by occupation' may do whatever is customary among reasonably prudent men engaged in the same occupation, respondent was permitted to prove that it was the usual practice and absolutely necessary for persons thus employed to ride upon the top of cars from the chute where live stock is loaded in Sioux City to the railway yards where trains are made up, and, on account of the distance from the stockyards to the railway yards, and the great number of tracks therein, there is no other way to know the location of his cars, and get out of the city on the train into which they are taken. Modern courts very justly hold restrictions in accident policies inoperative, which render the insurance nugatory and valueless by attempting to avoid liability for injuries

> sustained by the insured while performing necessary acts embraced in his classified occupation. In the case of Dailey vs. Preferred Masonic Mutual Accident Association, (Mich.) 57 N. W. 184, 26 L. R. A. 171, the Supreme Court of Michigan denied the right of the insurer to insist upon a provision in a policy issued to a railway passenger conductor to the effect that nothing would be paid for injuries or death occasioned by an attempt to enter or leave moving conveyances using steam as a motive power * * * ."

Among other cases which we believe hold to the same effect are: Rustin vs. Standard Life & Acc. Ins. Co., 58 Neb. 792, 79 N. W. 712; International Travelers Assoc. vs. Votaw, ... Texas ..... , 197 S. W. 237; Brown, Administratrix, vs. Railway Passenger Assurance Co., 45 Mo. 222.

Petitioner issued its certificate of membership to James Prinsen knowing that he, at the time, was a powder salesman for the Western Powder Company. The letterhead of the Western Powder Company and upon which Mr. Prinsen designated his beneficiary, the appellant in this case, indicated (R. p. 29) that his employer had to do with the handling of dynamite, blasting dynamite, sporting powder, fuses, caps and electric exploders. After having accepted premiums upon the certificate of membership from 1915 to 1931, with the knowledge and upon the understanding that the assured was a powder salesman for a company engaged in the handling and, of course, the moving and transportation of explosive substances, can the petitioner be permitted to say that the assured comes within the excepted risk specified? Petitioner, with the knowledge that the assured was engaged or might be engaged in the moving or transportation of an explosive, should never have accepted his premiums over a period of

sixteen years, realizing, as it did, the incidental risks of his occupation.

CONCLUSION

In conclusion we respectfully suggest:

1. That James Prinsen, at the time of his death, was not "participating" in the moving or transportation of dynamite caps or other explosives. If it can be said that Mr. Prinsen, while riding upon the truck driven by Begaman, and over which he had no control, was "participating" in the moving or transportation of the articles that might have been upon the truck at the time, we submit that a most dangerous precedent will be made and that such a ruling can be carried to a ridiculous extreme.

2. Assuming, for the purpose of argument, that the assured at the time of his death was "participating" in the transportation or moving of the dynamite caps, there is not a scintilla of evidence that the participation in the moving or transportation of the dynamite caps caused or resulted in the death of the assured. Unless the affirmative was made to appear by the petitioner and sustained by a preponderance of the evidence, the trial court erred in directing a verdict in favor of the petitioner. There being no evidence on the subject, it most certainly could not be said that petitioner had sustained its burden in this respect.

3. That the proximate cause under the record in this case was the collision between the truck and the train and not the explosion, and that a verdict ought to be, under the record in this case, directed for the plaintiff, or at any rate submitted to the jury.

4. That, where there are two causes, so intermingled that it cannot be determined which produced the injury or death of the assured, that the policy will be held to cover the risk.

5. To come within the execepted risk, that the assured's death was caused by a result "of voluntary or unnecessary exposure to danger or to obvious risk of injury" petitioner can not rely upon the doctrine of negligence, but must affirmatively show that the assured was in danger, conscious of it, and intentionally risked the consequences of exposing himself to it. The record is also silent in this respect.

6. Petitioner accepting the assured's premiums for a period in excess of sixteen years, knowing that he was engaged in the handling, sale, distribution, moving and transportation of explosive substances as an employee of the Western Powder Company, cannot be heard to say that a risk incident to such employment is excepted under its policy, assuming, of course, only for the purpose of argument, that such was the case.

7. The ground of petitioner's motion for a directed verdict being based only upon the proposition that the assured was "participating" in the moving or transportation of an explosive substance at the time of his death, and that he voluntarily and unnecessarily exposed himself to danger or to obvious risk of injury, in riding upon the truck driven by Begaman, and there being no evidence in the record to support such contentions, and the petitioner failing to sustain the burden of proof in those respects or on any other matter which might constitute a defense to respondent's claim, the trial court erred in directing a verdict in favor of the peti-

tioner and against the respondent and that the Circuit Court of Appeals was correct in its decision reversing the trial court.

Respectfully submitted,

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